

## STIPULATIONS

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

### **ISSUES**

- (1) What is the nature and extent of claimant's disability?
- (2) What is the liability of the Kansas Workers Compensation Fund?

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) Claimant is entitled to a functional impairment of twenty percent (20%) for the injuries suffered to his back on or about January 26, 1991.

Claimant, an employee of Bosley Tire Service, was injured on January 26, 1991, while carrying fifteen to twenty (15-20) pound tires across the parking lot when he slipped on the ice and fell. Subsequent to this injury, claimant underwent back surgery with Dr. Anthony G. A. Pollock, who performed a two-level decompression at L4-L5, L5-S1 without fusion. Subsequent to the surgery, Dr. Pollock returned the claimant to work with specific restrictions of no lifting on a regular basis over fifteen (15) pounds as well as limited bending and twisting.

Claimant attempted to return to work with the respondent but was unable to do so due to his inability to pass a urinalysis test, testing positive for cocaine.

Since his failure to pass the urinalysis test, claimant has been employed by more than one employer. At the time of the regular hearing, claimant was working for All Star Material in Arizona at a wage comparable to or greater than the wage he was earning on the date of accident.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 1992 Supp. 44-510e(a) states in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

K.S.A. 1992 Supp. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

Claimant has returned to work subsequent to his injury within the restrictions set forth by Dr. Pollock. Claimant has shown the ability, and is currently earning, a wage comparable to or greater than his average weekly wage at the time of the injury. The Appeals Board finds that, based upon a review of the entire record, claimant has failed to show by a preponderance of the credible evidence that the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e(a) has been overcome. As such, claimant is limited to a functional impairment.

The only functional impairment contained in the record is that of Dr. Anthony G. A. Pollock, who assessed a twenty percent (20%) physical impairment to the back based upon the American Academy of Orthopedic Surgeons Guide to Physical Impairment. Dr. Pollock elected to reject the guidelines of the American Medical Association Guides as being too stingy in this particular situation. While Dr. Pollock does state that fifteen percent (15%) of the impairment should be assessed against a 1982 injury, he does testify that the claimant's current functional impairment rating is twenty percent (20%). When conflicts in testimony occur, it becomes the function of the trier of fact to decide which is more accurate and/or credible and to adjust the medical testimony along with the testimony of claimant and any other testimony that may be relevant to the question of disability. The trier of fact in workers compensation cases is not bound by medical evidence presented and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). The Appeals Board finds, based upon the entire record, that a twenty percent (20%) functional impairment rating would be appropriate in this matter and awards same to claimant.

(2) The Appeals Board finds seventy-five percent (75%) of the Award should be assessed against the Kansas Workers Compensation Fund and twenty-five percent (25%) of the Award should be assessed against the respondent in this matter.

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567a; Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

Liability will be assessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work-related injury. An employee is handicapped under the Act if the employee is inflicted with an impairment of such character as to constitute a handicap in obtaining or retaining an employee. Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980).

K.S.A. 44-567(b) provides in part:

“In order to be relieved of liability under this section, the employer must prove either that the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained a handicapped employee in employment after acquiring such knowledge.”

The employer has the burden of proving that it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The Appeals Board finds that the respondent knowingly retained a handicapped employee prior to the claimant's injury of January 26, 1991.

The medical testimony of Dr. Pollock indicates the claimant's functional impairment would be assessed fifteen percent (15%) to the 1982 injury and five percent (5%) to the 1991 injury.

Dr. Pollock's testimony coupled with the finding that the respondent had knowledge of this preexisting handicapped condition persuades the Appeals Board that this contribution situation requires that the Award be assessed seventy-five percent (75%) against the Kansas Workers Compensation Fund and twenty-five percent (25%) against the respondent.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated February 28, 1994, shall be and hereby is modified and an award of compensation is hereby entered in favor the claimant and against the respondent for a 20% permanent partial impairment to the body as a whole on a functional basis.

Claimant is entitled to 52.43 weeks temporary total disability compensation at the rate of \$193.31 per week in the sum of \$10,135.24, followed thereafter by 362.57 weeks of compensation at the rate of \$38.66 per week in the sum of \$14,016.96, making a total award of \$24,152.20.

As of August 12, 1994, claimant is due and owing 52.43 weeks temporary total disability compensation at the rate of \$193.31 per week in the sum of \$10,135.24, followed by 132.57 weeks permanent partial disability compensation at the rate of \$38.66 per week totalling \$5,125.16 for a total due and owing of \$15,260.40 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$8,891.80 shall be paid at the rate of \$38.66 per week for 230 weeks until fully paid or until further order of the Director.

Claimant is entitled to unauthorized medical expense of up to \$350.00 upon presentation of an itemized statement.

Claimant's attorney fee contract is hereby approved insofar as it is not in contradiction of K.S.A. 44-536.

The respondent is awarded compensation against the Kansas Workers Compensation Fund with the Fund reimbursing respondent for 75% of any and all monies paid in this matter pursuant to this Order.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed 25% against the respondent and 75% against the Kansas Workers Compensation Fund with the fees to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates Transcript of Regular Hearing	\$57.00
Don K. Smith & Associates Deposition of Ronald Ray Manning	\$214.50
Satterfield Reporting Services Deposition of Anthony G. A. Pollock, M.D.	\$143.60
Deposition of Jerry D. Hardin	\$178.80

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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William F. Morrissey, Special Administrative Law Judge  
George Gomez, Director